

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

APPALACHIAN STAR
VENTURES, INC.,

Debtor.

No. 93-35224
Chapter 7

N. DAVID ROBERTS, JR.,
TRUSTEE,

Plaintiff,

vs.

Adv. Pro. No. 96-2059

BRISTOL TENNESSEE
ELECTRIC SYSTEM,

Defendant.

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding initiated by the plaintiff, N. David Roberts, Jr., Trustee (the "Trustee"), on September 16, 1996, seeks to avoid and recover certain alleged preferential payments to the defendant, Bristol Tennessee Electric System, made within ninety days preceding the bankruptcy filing of the debtor, Appalachian Star Ventures, Inc., on December 30, 1993. Pending before the court is the defendant's motion for summary judgment filed on March 28, 1997, and the response in opposition filed by the Trustee on April 4, 1997. Defendant contends that the Trustee was one day late in filing his complaint commencing this adversary proceeding and, therefore, it is entitled to a judgment as a matter of law based upon the two-year limitations period for commencing a preference action set forth in 11 U.S.C. § 546(a)(1). The Trustee responds that his complaint was timely filed because the two-year limitations period ended on Sunday, September 15, 1996, and that in such an event, Fed. R. Bankr. P. 9006(a) provides that the limitations period does not run until the following Monday, which in this case was September 16, 1996. For the following reasons, the court concludes that the action is not barred by 11 U.S.C. § 546(a). This is a core proceeding. 28 U.S.C. § 157(b)(2)(F).

Because the underlying bankruptcy case was filed by the debtor prior to October 22, 1994, the amendment to section

546(a)(1) by § 216 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994), is not applicable. The preamendment version of § 546(a) provides as follows:

An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

- (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or
- (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a).

The debtor's bankruptcy case commenced under chapter 11, but was subsequently converted to chapter 7 upon the United States trustee's motion by order entered September 16, 1994. That same day, the United States trustee filed a notice of appointment of N. David Roberts, Jr., as the interim trustee pursuant to 11 U.S.C. § 701. Since the creditors did not elect another trustee at the 11 U.S.C. § 341(a) meeting on October 12, 1994, Mr. Roberts became the trustee in the case on that date as provided by 11 U.S.C. § 702(d).

Presuming that the two-year limitations period of § 546(a)(1) ended on September 15, 1996, as both parties do, the issue presented is whether the Trustee had until Monday, September 16, 1996, in which to timely commence this preference action. In *Bartlik v. U.S. Dept. of Labor*, 62 F.3d 163 (6th Cir. 1995), an *en banc* decision by the Sixth Circuit Court of

Appeals, the court stated "that when a filing is required to be made on a Sunday and is made on Monday, it is timely filed." *Id.* at 167. See also *Merriweather v. City of Memphis*, 107 F.3d 396, 398 n.2 (6th Cir. 1997) ("A statute of limitations that would run on a Saturday or Sunday would not bar a complaint filed the following Monday."). The court expressly overruled its earlier opinion in *Martin v. First National Bank of Louisville (In re Butcher)*, 829 F.2d 596, 600 (6th Cir. 1987), *cert. denied*, 484 U.S. 1078, 108 S. Ct. 1058 (1988), which had held that Fed. R. Bankr. P. 9006(a) could not be applied in computing the running of the two-year statute of limitations provided by § 546(a). *Bartlik*, 62 F.3d at 166.

Bartlik now makes it clear that Fed. R. Bankr. P. 9006(a) does apply in computing the running of the two-year limitations period of § 546(a). See also *Merriweather*, 107 F.3d at 399 n.4 ("Rule 6(a) [which is analogous to Fed. R. Bankr. P. 9006(a)] now applies to all statutes of limitations in federal court.").

That rule provides in pertinent part as follows:

In computing any period of time prescribed or allowed by ... any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, ... in which event the period runs until the end of the next day which is not one of the aforementioned days

Fed. R. Bankr. P. 9006(a). As the defendant claims the two-year limitations period of § 546(a) ran on September 15, 1996, which without dispute was a Sunday, Rule 9006(a) provides that the limitations period does not run until the next day, Monday, September 16, 1996. Accordingly, the defendant's motion for summary judgment is without merit.

The court further observes that the Sixth Circuit Court of Appeals has indicated that when a limitations period is determined by calendar years, as in the case of § 546(a), the limitations period will end on the same calendar date irrespective of any intervening leap year (unless, of course, the ending date falls on a weekend, federal holiday or a day on which weather or other conditions have made the clerk's office inaccessible). See *Merriweather*, 107 F.3d at 400. Thus, the limitations period which the parties contend began on September 16, 1994, would have ended on September 16, 1996, and not on September 15, 1996.* As a result, this action was timely filed

*Although defendant cites *Farinash v. NationsBank of Tennessee, N.A. (In re John Hicks Oldsmobile-GMC Truck, Inc.)*, 192 B.R. 911, 912 (E.D. Tenn. 1996), for the proposition that the two-year statute began to run on the date of the trustee's appointment, that decision is not at odds with the holding of *Merriweather*. "The rule does not say that a limitations period does not begin to run until the second day; indeed, it specifically refers to 'the day of the act, event, or default from which the designated period of time begins to run.' Instead, the rule directs that in computing the applicable
(continued...)

when it was commenced on September 16, 1996.

Finally, 11 U.S.C. § 546(a) in pertinent part provides that "[a]n action or proceeding under section ... 547 ... of this title may not be commenced after ... two years after the appointment of a trustee under section 702 ... of this title" Mr. Roberts was not appointed as trustee under 11 U.S.C. § 702 until October 12, 1994. His appointment as interim trustee was pursuant to 11 U.S.C. § 701. The overwhelming majority of courts considering this issue have rejected the proposition that the two-year statute of limitations provided by 11 U.S.C. § 546(a) runs from the trustee's interim appointment under § 701, even if the same person is appointed both as interim and permanent trustee in a case. *See, e.g., Messer v. Harbor Distributing Corp. (In re C&R Beer & Soda, Inc.)*, 186 B.R. 173, 180 (Bankr. E.D.N.Y. 1995), and cases cited therein. Because § 546(a) refers to the appointment of a trustee under § 702 as the date for the running of the two-year statute of limitations, the limitations period had not expired when this action was filed.

An order denying the defendant's motion for summary judgment

*(...continued)
period, the day of the relevant event is the zero point from which the days are to be counted." *Merriweather*, 107 F.3d at 400.

will be entered contemporaneously with the filing of this memorandum opinion.

FILED: April 17, 1997

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE